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Supreme Court No. 80318-8
Court of Appeal Cause No. No. 34714-8-II

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

WACHOVIA SBA LENDING, INC., d/b/a WACHOVIA SMALL
BUSINESS CAPITAL, a Washington corporation,

Plaintiff/Respondent

vs.

DEANNA D. KRAFT, individually,

Defendant/Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO RESPOND, STRIKE
PORTIONS OF BRIEF, AND/OR SUPPLEMENT APPELLATE RECORD**

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**KRAFT'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO
RESPOND, STRIKE PORTIONS OF BRIEF, AND/OR
SUPPLEMENT APPELLATE RECORD**

In its response to Ms. Kraft's motion, Wachovia concedes it misstated the facts of this case to the Court, and concedes that there were no facts in the record below to support its original statement of facts relating to settlement negotiations. Remarkably, rather than apologizing for its misrepresentations or attempting to provide an explanation of the misrepresentations, Wachovia uses the situation as an opportunity to supplement the record with even further evidence that was not before the trial court. As stated in the original motion, Ms. Kraft's preference is that anything not before the trial court should be stricken, including any allegations in the briefs that are not supported by the record. RAP 10.3(a)(4). This case should be heard and decided on the record before the trial court and the merits of the legal issues, not on allegations unsupported by the record, or that distort the facts of the case.

Oral argument in this case will likely be less than two weeks away by the time this motion is decided. Ms. Kraft would prefer to use that time to prepare rather than respond to new and unfounded allegations. Unfortunately, Wachovia continues to make unsupported allegations even in its response to this motion. Wachovia now argues, "Implicit in this

correspondence is Ms. Kraft's refusal to stipulate to the continuance of the parties' trial date..." Wachovia's Response to Motion, page 2. Wachovia has to argue it is "implicit" Ms. Kraft refused to stipulate to a continuance, because there is no evidence this ever happened. The truth of the matter is that Wachovia never requested a trial continuance. But again, these are the types of things the parties should not even be arguing about because there is no evidence in the record and these are things the trial court did not consider.

Wachovia goes on to argue that the record should be supplemented because doing so demonstrates that Ms. Kraft was being "aggressive." Wachovia's Response to Motion, page 3. This is what historians call "revisionist." The letter from Ms. Conniff dated March 23, 2006, demonstrates it was *Wachovia* who made a post dismissal, pre appeal settlement offer for nearly \$7,500.00 *more* than it was willing to settle for six days earlier (the letter from Ms. Conniff shows Ms. Kraft's \$5,000 settlement offer was a *counter* offer). Yet according to Wachovia, this is evidence of Ms. Kraft's aggression. Curiously, Wachovia does not propose supplementing the record with its own settlement offer. In any event, these are again arguments and facts that really have nothing to do with the evidence before the Court, the record, or the merits of the issues on appeal. They should be stricken and the parties should be encouraged to address the

merits of the case. RAP 10.3(a)(4).

One of the reasons it is important for an appellate court to have a record on review is so that it can judge for itself what happened below, without having to rely upon the character for truthfulness of the litigants and their counsel. Ms. Kraft would like her case decided on the merits. By granting review, this Court felt that the case involved some issue or issues that ought to be addressed. Arguments about settlement negotiations are not relevant to the merits of this case and should not take up any more of this Court's time.

CONCLUSION

Based upon the foregoing, Ms. Kraft respectfully requests that references to settlement negotiations not supported by the record be stricken, that alternatively the record be supplemented as suggested by the parties, or that this motion, the response, and this reply be considered a response to Wachovia's Supplemental Brief.

DATED this 13th day of May, 2008.

BLADO KIGER, P.S.

/s/

DOUGLAS N. KIGER, WSBA #26211
Attorney for Deanna Kraft

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CERTIFICATE OF SERVICE

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of May, 2008, he electronically filed Ms. Kraft's Reply in Support of Motion for Leave to Respond, Strike Portions of Supplemental Brief, or Supplement the Record, and Certificate of Service with the Washington State Supreme Court, and true and correct copies of the same for delivery to the following parties and their counsel of record:

RESPONDENT	ATTORNEY FOR RESPONDENT
Wachovia SBA Lending, Inc., d/b/a Wachovia Small Business Capital	Alexander S. Kleinberg EISENHOWER & CARLSON, PLLC 1200 Wells Fargo Plaza 1201 Pacific Avenue Tacoma, WA 98402 akleinberg@eisenhowerlaw.com
Amicus Curiae	Harold T. Hartinger 906 6 th Avenue, #C Tacoma, WA 98405 hthartinger@harbornet.com

DATED this 13th day of May, 2008, at Tacoma, Washington.

BLADO KIGER, P.S.

/s/

Douglas N. Kiger

FILED AS ATTACHMENT
TO E-MAIL

OFFICE RECEPTIONIST, CLERK

To: Douglas Kiger
Cc: akleinberg@eisenhowerlaw.com; Harold T. Hartinger
Subject: RE: Case No. 80318-8 Wachovia v. Kraft

Rec. 5-13-08

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From: Douglas Kiger [mailto:doug@bladokiger.com]
Sent: Tuesday, May 13, 2008 4:22 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: akleinberg@eisenhowerlaw.com; Harold T. Hartinger
Subject: Case No. 80318-8 Wachovia v. Kraft

Attached please find Ms. Kraft's reply in support of the Motion for Leave to Respond, Strike Portions of Brief, and/or Supplement Appellate Record. This reply is being submitted electronically as authorized by the Court's letter dated May 6, 2008.

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